Public Prosecutor v Scott Allen Hazlett & Ors

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–4 OF 1999
MOHD HISHAMUDDIN J
5 DECEMBER 2003

Criminal Law — Murder — Admission of oral cautioned statement by accused — Whether statement voluntary — Penal Code s 302

Criminal Law — Murder — Evidence — Impeachment of key prosecution witness — Whether prosecution witness had given satisfactory explanation to serious discrepancies and material contradictions — Penal Code s 302

Evidence — Statement — Cautioned statement — Oral statement of male accused taken by female police officer — Whether voluntary

The four accused were jointly charged, and tried under s 302 of the Penal Code for the murder of an elderly woman, one Mdm Seow Saw Poh @ Siew Siaw Poh, on the night of 27 December 1998 at Jalan Tebrau 1, Ukay Heights, Hulu Kelang, District of Gombak, Selangor. They were originally tried before Kang Hwee Gee J on 17 January 2000. The learned judge heard the case only partially. Subsequently, the first accused died while under remand in prison. With the consent of the prosecution and the defence, the case against the remaining three accused was ordered be heard *de novo*. The prosecution, in its endeavour to establish a *prima facie* case of the offence of murder against all the three accused, relied mainly on the evidence of the prosecution's key witness, one Haikal Shah bin Muhammad Kamal ('PW3'), who claimed to be an eye-witness as well as an accomplice to the alleged crime. The defence sought to impeach the credit of PW3. There were also issues on the voluntariness of the oral cautioned statement of the first and second accused. The prosecution sought to adduce the oral cautioned statement of the second accused through a woman police (PW14).

Held, the prosecution failed to establish a *prima facie* case:

(1) In the present case, the court was satisfied that, out of the eight sets of contradictions submitted, there were five sets of serious discrepancies or material contradictions (see para 41). At the conclusion of the prosecution's case, having considered PW3's explanations in the context of the totality of the prosecution evidence, the court was of the view that his explanations to the five sets of serious discrepancies or material contradictions were unsatisfactory and that there was nothing in the whole of the prosecution evidence that could have salvaged his credit. Accordingly, the defence had succeeded in impeaching the credit of PW3. Once the credit of PW3 was successfully impeached, his entire evidence must be discarded. Considering the prosecution case as a

whole, once the entire evidence of PW3 was discarded, the prosecution's case fell apart (see para 70).

(2) The prosecution had failed to establish that *prima facie* the oral statement of the second accussed was voluntary. First, in the present case, once it appeared to PW14 in the course of the interrogation that the second accused had imparted or about to impart information crucial for the purpose of prosecution or further investigation, PW14 should have made arrangements for the accused to be brought before another police officer, competent to record a cautioned statement, who was uninvolved in the investigation of the case. In the present case, this was not done although PW14 had ample opportunity to do so. Second, there was ample time to take down a written cautioned statement, yet no reason given as to why the oral cautioned statement was not reduced into writing. Third, for the purpose of body examination to ensure that the second accused had not been physically abused, PW14 being a female officer should not have asked the second accused to remove his shirt, and should not have personally carried out the body examination. Such an examination was inappropriate and oppressive. It was high handed and amounted to disrespecting a person's modesty. The second accused being a male, such body examination should have been carried out by a male police officer (see para 72).

(3) The evidence regarding the first accused movements from the time of his arrest until the recording of his cautioned statement showed that the first accused was interrogated, moved from one police station to another, and had to spend a few hours at a magistrate's court. In the process, he was deprived of proper sleep and rest before the recording of the cautioned statement. Taking into account that the first accused was only an 18-year old schoolboy then, the treatment accorded to him was oppressive (see para 75).

[**Bahasa Malaysia summary**

Empat orang tertuduh telah dikenakan pertuduhan bersama, dan dibicarakan di bawah s 302 Kanun Keseksaan kerana membunuh seorang wanita tua, Mdm Seow Saw Poh @ Siew Siaw Poh, pada malan 27 Disember 1998 di Jalan Tebrau 1, Ukay Heights, Hulu Kelang, District of Gombak, Selangor. Mereka pada mulanya telah dibicarakan di hadapan Kang Hwee Gee H pada 17 Januari 2000. Hakim yang bijaksana telah mendengar sebahagian daripada kes tersebut. Berikutan itu, tertuduh pertama semasa direman di dalam penjara telah meninggal dunia. Dengan persetujuan pihak pendakwa dan pembela, kes terhadap tiga tertuduh lain diperintahkan agar didengar de novo. Pihak pendakwa, dalam usaha untuk membuktikan satu kes prima facie kerana kesalahan membunuh terhadap kesemua tiga tertuduh, bergantung

kepada saksi utama pihak pendakwa, iaitu Haikal Shah bin Muhammad Kamal ('PW3'), yang mendakwa menjadi saksi dan juga rakan sejenayah kepada jenayah yang dikatakan. Pihak pembela ingin mencabar kebolehpercayaan PW3. Terdapat juga persoalan-persoalan tentang kesukarelaan penyataan beramaran secara lisan tertuduh pertama dan kedua. Pihak pembela memohon penyataan beramaran secara lisan tertuduh kedua dikemukakan melalui polis wanita (PW14).

Diputuskan, pihak pemdakwa gagal untuk membuktikan kes *prima facie*.

(1) Dalam kes semasa, mahkamah berpuas hati bahawa, daripada lapan set percanggahan yang dikemukakan, terdapat lima set percanggahan atau pertentangan yang material. Di akhir kes pihak pendakwa, setelah menimbangkan penjelasan PW3 dalam keseluruhan konteks keterangan pihak pendakwa, mahkamah berpendapat bahawa penjelasan beliau tentang lima set percanggahan serius atau pertentangan material tersebut tidak memuaskan dan bahawa tiada apa-apa dalam keterangan keseluruhan pihak pendakwa yang boleh menyelamatkan kebolehpercayaan beliau. Sewajarnya, pihak pembela berjaya mencabar kebolehpercayaan PW3. Apabila kebolehpercayaan PW3 berjaya dicabar, keseluruhan keterangan beliau tidak patut diambil kira. Dengan mengambil kira kes pihak pendakwa secara keseluruhan, setelah keseluruhan keterangan PW3 tidak diambil kira, kes pihak pendakwa gagal (lihat perenggan 70).

(2) Pihak pendakwa telah gagal untuk membuktikan secara *prima facie* bahawa penyataan lisan tertuduh kedua adalah secara sukarela. Pertama, dalam kes semasa, apabila PW14 menyedari semasa soal siasat dijalankan bahawa tertuduh kedua telah mendedahkan atau akan mendedahkan maklumat yang penting bagi tujuan pendakwaan atau siasatan selanjutnya, PW14 sepatutnya mengaturkan agar tertuduh dibawa kepada pegawai polis lain, yang kompeten untuk merekodkan satu penyataan beramaran, yang tidak terlibat dalam siasatan kes tersebut. Dalam kes semasa, ini tidak dilakukan meskipun PW14 mempunyai peluang untuk berbuat demikian. Keduanya, terdapat masa yang mencukupi untuk membuat satu penyataan beramaran secara bertulis, namun tiada sebab diberikan kenapa penyataan beramaran secara lisan itu tidak dibuat secara bertulis. Ketiga, bagi tujuan pemeriksaan badan untuk memastikan tertuduh kedua tidak didera secara fisikal, PW14 yang merupakan pegawai polis wanita tidak sepatutnya menyuruh tertuduh kedua membuka baju, dan tidak sepatutnya secara peribadi membuat pemeriksaan badan. Pemeriksaan sedemikian tidak sesuai dan menindas. Ia tidak sepatutnya berlaku dan boleh disifatkan sebagai tidak menghormati maruah seseorang. Memandangkan tertuduh kedua seorang lelaki, pemeriksaan badan hendaklah dilakukan oleh pegawai polis lelaki (lihat perenggan 72).

(3) Keterangan berhubung pergerakan tertuduh pertama dari masa beliau ditangkap sehingga penyataan beramaran beliau direkodkan menunjukkan bahawa tertuduh pertama telah disoal siasat, dibawa dari satu balai polis ke satu yang lain, dan berada di mahkamah majistret beberapa jam. Dalam proses ini, beliau tidak dapat tidur dan rehat yang mencukupi sebelum penyataan beramaran direkodkan. Dengan mengambil kira yang tertuduh pertama hanya seorang budak sekolah berumur 18 tahun pada masa itu, layanan yang diberikan kepadanya bersifat menindas (lihat perenggan 75).]

Notes

For cases on cautioned statements, see 7(2) *Mallal's Digest* (4 th Ed, 2003 Reissue) paras 2273–2285.

For cases on s 302 of the Penal Code (Malaysia), see 4 *Mallal's Dig*est (4th Ed, 2003 Reissue) paras 1424–1477.

Cases referred to

Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd [1997] 2 MLJ 829 (refd)

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1 (refd)

Dato' Mokhtar bin Hashim v PP [1983] 2 MLJ 232 (refd)

Krishnan & Anor v PP [1981] 2 MLJ 121 (refd)

Kwang Boon Keong Peter v PP [1998] 2 SLR 605 (refd)

Lim Young Sien v PP [1994] 2 SLR 257 (refd)

Muthusamy v PP [1948] MLJ 57 (refd)

Ong Joo Chin v R [1946] MLJ 1 (refd)

Paramasivam v PP [1970] 2 MLJ 107 (refd)

Syed Abdul Aziz v PP [1993] 3 SLR 538 (refd)

Legislation referred to

Criminal Procedure Code ss 113, 117

Evidence Act 1950 ss 145(1), 155(c)

Penal Code s 302

Mohd Hanafiah bin Zakaria (Kamarulzaman bin Jamil and Salim bin Soib) (Deputy Public Prosecutors) (Attorney General's Chambers) for the prosecution.

Manjeet Singh Dhillon (Manjeet Singh Dhillon) for the first accused.

S Saravanan (Saravanan & Co) for the second accused.

M Visvanathan (Patrick Dass with him) (Saibullah MV Nathan & Co) for the third accused.

CG Oh holding watching brief for Seow Saw Poh, deceased.

Mohd Hishamuddin J:

THE BACKGROUND

[1] In the present case, originally there were four accused charged, namely:

(1) Alagendra a/l Subramaniam;

(2) Scott Allen Hazlett;

(3) Sidney Alloysious Michael; and

(4) Prakash Kumar a/l Subramaniam.

[2] They were jointly charged and tried under s 302 of the Penal Code for the murder of an elderly woman, one Mdm Seow Saw Poh @ Siew Siaw Poh, on the night of 27 December 1998 at Jalan Tebrau 1, Ukay Heights, Hulu Kelang, District of Gombak, Selangor.

[3] They were originally tried before Kang Hwee Gee J on 17 January 2000. The learned judge heard the case only partially. For, after hearing the testimony of only three prosecution witnesses, the learned judge was transferred from the High Court of Shah Alam to the High Court of Kuala Lumpur.

[4] In September 2000 I was transferred from the High Court of Kuala Lumpur to the High Court of Shah Alam. The Chief Judge (Malaya) directed me to take over conduct of the trial.

[5] This case was first mentioned before me on 9 February 2001. On this date, the prosecution informed the court that the first accused, Alagendra, had died while under remand in prison and applied that the charge against the deceased be struck out, which the court duly did. Thereafter, with the consent of the prosecution and the defence, I ordered that the case against the remaining three accused be heard *de novo*. The trial was fixed to commence on 13 August 2001.

THE AMENDED CHARGE, THE TRIAL AND THE DECISION

[6] On 13 August 2001, at the commencement of the trial, with the agreement of the prosecution and the defence, the remaining three accused were renumbered as follows:

(1) Scott Allen Hazlett (in this judgment shall be referred to as the 'first accused' or 'Scott');

(2) Sidney Alloysious Michael (in this judgment, shall be referred to as the 'second accused' or 'Sidney'); and

(3) Prakash Kumar a/l Subramaniam (in this judgment, shall be referred to as the 'third accused' or 'Prakash').

[7] And the charged was amended to read:

Bahawa kamu bersama dengan seorang yang sebelum ini dituduh bersama kamu tetapi telah meninggal dunia bernama Alagendra a/l Subramaniam (K/P No 790205–14–5123), pada 27 Disember 1998 jam lebih kurang 9mlm di tepi Jalan Tebraul, Ukay Heights, Hulu Kelang, di dalam Daerah Gombak, dalam Negeri Selangor Darul Ehsan, dengan niat bersama kamu semua, telah melakukan bunuh dengan menyebabkan kematian Seow Saw Poh @ Siew Siaw Poh (K/P No 1162294); dan oleh itu, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan, dibaca bersama dengan s 34 Kanun yang sama.

[8] Having carefully considered, scrutinised and analysed the prosecution evidence in its totality and the submissions by the learned DPP and the respective defence counsel, at the end of the case for the prosecution I was of the opinion that the prosecution had failed to establish a *prima facie* case against all the three accused.

[9] They were accordingly acquitted and discharged.

[10] My grounds are as follows.

THE MURDER AND POST MORTEM FINDINGS

[11] There is, to my mind, *prima facie* evidence that the deceased, 73 year old Mdm Seow Saw Poh, was brutally murdered at a roadside on the night of 27 December 1998 at Ukay Heights, Hulu Kelang. Her body was found by one John Winther Christensen (PW4) who happened to be driving his car with his wife along the road in question at about 10pm on 27 December. At first what PW4 saw was just a bonfire. Out of curiosity he stopped his car, got out and went to have a closer look; and what he saw burning seemed to be like a pair of human legs. He at first thought that what he saw could have been a mannequin. But, nevertheless, entertaining a lingering suspicion, he drove to the nearest police station at Ampang to report what he saw. On the way, however, he met a police patrol car. He informed the two policemen (one of them, L/Cpl Abu Bakar, PW1) in the patrol car what he saw, and brought them to the scene of the burning. Upon arrival at the site of the burning, they discovered to their horror that what PW4 earlier saw burning was in fact the body of a human — the body of the deceased, in a badly burnt state. PW1 immediately fetched water from a nearby condominium to douse the fire and thereafter informed the Taman Melawati police station; and around midnight the investigating officer, Insp Hanifah (PW19), arrived. PW19 after making preliminary investigation immediately made arrangement for a forensic pathologist to come to the scene; and the forensic pathologist, Dr Abdul Halim Mansar (PW8), arrived at the scene around 1.30am 28 December 1998.

[12] According to PW8 almost the whole body of the deceased was burnt except the areas around the face, the back of the head, the back of the body and behind the legs. Suspecting that a murder might have taken place, PW8 requested the police to have the body brought to the Kuala Lumpur Hospital

for a post mortem. PW8 carried out the post mortem. PW8 discovered several serious wounds at the head area extending to the neck of the deceased that could have been inflicted by a hard and blunt object. According to PW8 death was caused by strangulation and burning.

[13] Now, the question is: who was (or were) the murderer (or murderers)?

[14] It is the prosecution's contention that the three accused in the dock, together with Alagendra, now deceased (and, originally, the first accused), were the murderers.

THE EVIDENCE OF HAIKAL SHAH (PW3), THE KEY WITNESS

[15] The prosecution, in its endeavour to establish a *prima facie* case of the offence of murder against all the three accused, relied mainly on the evidence of the prosecution's key witness, one Haikal Shah bin Muhammad Kamal (PW3), who claimed to be an eye-witness as well as an accomplice to the alleged crime.

[16] PW3 said in evidence that he knew the deceased very well. He had known her for some eight years, and used to call her 'Auntie'. The deceased lived alone by herself in an apartment at a condominium known as Menara Impian, situated nearby to PW3's house. PW3 was a part-time driver of the deceased. He also ran errands for her.

[17] According to PW3, on 27 December 1998, Alagendra and Prakash, who were his friends, came to his house at Taman Tun Abdul Razak ('Taman TAR'). Alagendra and Prakash were brothers. At about 6 p. m. the same day PW3, Prakash and Alagendra adjourned from the house to a nearby club — the Kelab Darul Ehsan. The club was just eight minutes walk away. At the club, the three of them were joined by Scott (the first accused), an 18 year old youth, who was also a friend as well as neighbour of PW3. Alagendra also knew the deceased, for PW3 had earlier introduced him to her. According to PW3, when introducing Alagendra to the deceased, he had told the deceased that Alagendra could also drive her whenever he (PW3) was not available. At the club, while the four were chit chatting, PW3 received a call on his handphone from the deceased. The deceased called to say that she wanted PW3 to drive her to Ampang Point to buy medicine. PW3 said that he told the deceased that he would not be able to oblige her. PW3 then told the others of the deceased's request and Alagendra volunteered to drive the deceased. Having so agreed, Alagendra went to a public phone booth to call the deceased to inform her of his willingness to drive her to Ampang Point (PW3 explained that Alagendra did not use his (PW3's) handphone to make the call to the deceased as it could only be use to receive calls but not to make calls, due to non-payment of bills). On returning from the phone booth, Alagendra mooted the idea of robbing the deceased. According to PW3, initially he thought Alagendra was merely joking.

[18] It is PW3's evidence that at around 7pm the same day the four of them (PW3, Alagendra, Prakash and Scott) adjourned from the club to PW3's house. At the house all the four of them discussed how to rob the deceased. Prakash and Alagendra led the discussion. About half an hour later, another of their friend, that is, the third accused, Sidney, arrived at the house in his car and joined the discussion. Sidney was also informed of his role in the intended robbery.

[19] According to PW3, at the discussion, Prakash and Alagendra briefed what each of them was supposed to do during the robbery. Scott was to punch the deceased's face; Alagendra was to hit deceased's head with a baton until she faint; Sidney was to drive the deceased's car — a Proton Iswara; PW3 was to stay in the car and look after any money seized from the deceased; and Prakash was to drive Sidney's car. At about 9pm, all five of them left PW3's house. Alagendra, Sidney and Scott walked towards the deceased's house. Before they left, Alagendra fetched a baton from Sidney's car. Meanwhile, PW3 and Prakash waited in Sidney's car which was then parked near a phone booth (hereinafter this car will be referred to as 'Sidney's car'). Soon after, PW3 saw the deceased's car (Proton Iswara) approaching. It was driven by Sidney, with Alagendra seated next to him. Scott and the deceased were seated at the back seat. PW3 and Prakash followed behind in their (Sidney's) car, with Prakash driving. PW3 said he heard the deceased crying for help. The Proton Iswara first went uphill and then made a U-turn, came downhill slightly and stopped near some bushes. PW3's car (that is, Sidney's car driven by Prakash) stopped behind the deceased's car. Then PW3 saw Scott and Alagendra carrying the deceased's body out of the Proton Iswara and placing it by the side of the bushes.

[20] PW3 further testified that Prakash then drove Sidney's car to the front of deceased's car and got out of the car. He asked PW3 to take out two bottles from under Sidney's car seat and to give them to him, which PW3 did. From the smell of the contents of the bottles, PW3 believed that they were petrol. PW3 saw Scott and Sidney pouring the petrol over the body of the deceased. Then Alagendra and Sidney got into Sidney's car. PW3 said he was scared seeing what had happened and had asked Alagendra to send him home, but the latter refused. Instead, Alagendra and Sidney asked PW3 to follow them in Sidney's car to a Mobil petrol station at Ampang to buy petrol. For this purpose, Sidney handed to PW3 an empty mineral water bottle. On reaching the Mobil petrol station, PW3 got down from the car, bought a ringgit worth of petrol with his own money, returned to the car and handed the petrol filled bottle to Sidney. They then returned to the scene (that is, the place where earlier they had dumped the deceased). On reaching there, Sidney and Alagendra got out of the car. Prakash and Scott were still there. PW3 said that Alagendra later got back into the car and gave him a bag belonging, to the deceased's. PW3 saw Prakash asking Alagendra for a lighter.

[21] PW3 further said in evidence that he and Alagendra left the scene in Sidney's car. While in the car (this time driven by Alagendra), PW3 opened the deceased's bag and saw inside it a cash cheque worth RM1,000, a credit card and cash about RM400. PW3 asked Alagendra to take him to a food court in Ampang known as Medan Selera. At Medan Selera PW3 asked Alagendra to allow him to take RM50 from the RM400 cash that they had robbed from the deceased. With the RM50, PW3 bought three bottles of beer and two packets of cigarettes from a shop at the food court. They then returned to PW3's house. When reaching the house, the deceased's bag was left in the car. At the house PW3 lent Alagendra his black T-shirt as the latter's shirt was stained with blood.

[22] It is PW3's evidence that about 15 minutes to half an hour later Scott, Sidney and Prakash came to his house with their shirts already changed and were looking fresh as if they all just had a bath. Prakash carried a black plastic garbage disposal bag. Alagendra gave his blood stained shirt to Prakash to be put in the bag. PW3 gave his trousers, also stained with blood, to Prakash, who put it into the bag. PW3 explained how his trousers became stained with blood. He said that when he was in Sidney's car, Alagendra had placed the deceased's bag, stained with blood, on his lap. They (ie all the three accused and Alagendra) asked PW3 to follow them to burn the deceased's car, but he refused to get involved. The three accused and Alagendra then left PW3's house.

[23] PW3 told the court that after the three accused and Alagendra had left his house he borrowed his father's car and went back to the club (Kelab Darul Ehsan). At the club he phoned a friend, one Ahmad Ridzuan bin Che Mat (PW5), whom he called 'Wan', to confide what had happened. Wan (PW5) asked him to go over to his house at Kampong Melayu, Ampang. At Wan's house, PW3 narrated in detail to Wan what had happened. Wan knew all the three accused including Alagendra. From Wan's house PW3 drove back to his house to return his father's car, with Wan following behind on a motorcycle. From the house PW3 and Wan proceeded on Wan's motorcycle to a Kentucky Fried Chicken restaurant at Chow Kit Road. PW3 said that he was scared and did not know what to do. He said that at the KFC restaurant he and Wan discussed various options, namely:

(a) whether to lodge a police report; or

(b) whether to see PW3's uncle whom he called 'uncle Hashim'; or

(c) whether to go and discuss with their friend, Cico.

[24] PW3 decided to discuss with Cico first. So, from the KFC restaurant off they went to a stall at a food court at Pandan Jaya known as 'Celebrity Terminal', where Cico and his mother ran a food stall. Cico's real name is Eezag Farrough Harahap bin Jamaluddin (PW9). PW3 related to Cico what

had happened and Cico advised PW3 to phone his Uncle Hashim. Using a borrowed handphone, PW3 spoke to his uncle requesting to see him that night, but was unsuccessful in getting an appointment.

[25] PW3 further told the court that about half an hour later the three accused and Alagendra came to Cico's stall at Celebrity Terminal. They came and sat with PW3, Wan and Cico. PW3 alleged that Prakash and Scott told the three of them what they had done to the deceased. This is what PW3 said:

> Prakash told us that he ran over Aunty's body with a car, at the bushes. He ran over the body with Aunty's car. Scott told that he punched Aunty' sface. When he told us this he appeared relax. After that I did not want to hear any more, so I went to the rear of Cico's stall.

[26] At about 1am the three accused and Alagendra left Cico's stall. But before they left they asked PW3, Wan and Cico to follow them to their car (Sidney's car) where one of them opened the boot to show the blood stained clothing in the black plastic garbage disposal bag.

THE ARREST

[27] According to PW3, about a week later he was arrested by the police. The prosecution did not adduce any evidence as to the precise date of the arrest of PW3 or as to the identity of the police officer who arrested PW3. The two investigating officers in this case, Insp Hanifah (PW19) and Chief Insp Mohamad Razali (PW21), in their evidence, were silent on the arrest of PW3. In fact it is disquieting to note that no police officer was called to give evidence on the arrest of PW3.

[28] Scott Allen was arrested by one Insp Azizi (PW12) on 12 January 1999. He was arrested at his house at Taman Tun Abdul Razak at Ampang at 2.45am.

[29] The second accused, Sidney Alloysious Michael, was arrested on 13 January 1999 by Chief Insp Mohamad Razali bin Taib (PW21) at an address at Jalan Muhibah 25/7, Taman Sri Muda, Shah Alam.

[30] Alagendra and Prakash (the third accused) were arrested on 13 January 1999 at an address at Jalan Wangsa 5B, Bukit Antarabangsa, Ulu Kelang, Selangor. They were arrested by PW19.

THE IMPEACHMENT OF PW3'S CREDIT

[31] PW3 was intensively crossed examined by En Manjeet Singh, the learned counsel for Scott. In the course of cross-examination, En Manjeet Singh applied to impeach the credit of this sole eyewitness. The application was pursuant to s 155(c) of the Evidence Act 1950. This section reads:

> 155 Impeaching credit of witness.

The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him:

(a) by the evidence of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit;

(b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

[32] Although no specific reference is made by s 155(c) of the Evidence Act, nevertheless this provision must be read with s 145(1) of the same Act which reads:

145 Cross-examination as to previous statements in writing.

(1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without the writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

[33] Encik Manjeet submitted that PW3's present evidence contradicted materially his previous evidence given at the trial (heard partially) before Kang Hwee Gee J. Accordingly, the court carried out an impeachment proceeding in accordance with the principles and procedure as laid down by the above provisions supplemented by judicial authorities in the several landmark cases, in particular, the following:

(1) *Muthusamy v Public Prosecutor* [1948] MLJ 57;

(2) *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121; and

(3) *Dato' Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232.

[34] In *Muthusamy*, Taylor J explained the procedure as follows:

The proper way to apply the sections is this. On the request of either side, the court reads the former statement. If there is no serious discrepancy the court so rules and no time is wasted. The first necessity is to read it with the confident expectation that it will be different from the evidence but looking judicially to see whether the difference really is so serious as to suggest that the witness is unreliable.

Differences may be divided into four classes:

(a) Minor differences, not amounting to discrepancies;

(b) Apparent discrepancies;

(c) Serious discrepancies;and

(d) Material contradictions.

Minor differences are attributable mainly to differences in interpretation and the way in which the statement was taken and sometimes to differences in recollection. A perfectly truthful witness may mention a detail on one occasion and not remember it on another. A mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence. Both the statement and the evidence are usually narratives reduced from question and answer. The witness is not responsible for the actual expressions used in either, and all the less so where he does not speak English.

If the police statement gives an outline of substantially the same story, there being no apparently irreconcilable conflict between the two on any point material to the issue, the magistrate should say at once 'the difference is not such as to affect his credit' and hand the statement back.

If, however, the difference is so material as probably to amount to a discrepancy affecting the credit of the witness, the court may permit the witness to be asked whether he made the alleged statement. If he denies having made it, then either the matter must be dropped or the document must be formally proved, by calling the writer or, if he is not available, by proving in some other way that the witness did not make the statement.

If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the court, and he must have a fair and full opportunity to explain the difference.

If he can, then his credit is saved, though there may still be doubts as to the accuracy of his memory. This procedure is cumbersome and slow and therefore should not be used unless the apparent discrepancy is material to the issue.

[35] The court will allow an impeachment proceeding to be proceeded against a witness only where the court is satisfied that the differences are of '(c)' (serious discrepancies) and '(d)' (material contradictions) types (*Lim Young Sien v Public Prosecutor* [1994] 2 SLR 257; and *Kwang Boon Keong Peter v Public Prosecutor* [1998] 2 SLR 605).

[36] In *Krishnan* Salleh Abas FJ, after considering the procedure as laid down in *Muthusamy*, said (at p 123):

This procedure has been accepted and consistently followed by courts in this country and we see no reason to depart from it.

[37] The learned judge then continued:

One of the methods to impeach the credit of a witness is proof of his former statement inconsistent with the evidence which is liable to be contradicted. This is enacted by s 155 (c) of the Evidence Act, according to which impeachment essentially consists of two elements:

(a) contradicting the witness' evidence that is, confronting him with the inconsistent statement; and

(b) proof of the statement.

As regards contradicting, the second limb of s 145 (1) of the Act requires the party who conducts the impeachment to draw the witness' attention to the inconsistent part of his statement, before confronting him with it.... Thus as a first step it is essential that the court should be given the discretion to determine a preliminary question whether the witness' former statement is inconsistent with his evidence, otherwise much time will be wasted if it is found later that his former statement is not really irreconcilable with his evidence. We therefore think that it is a good procedure that a judge should be shown the statement as a first step in the impeachment procedure.

[38] Prior to the ruling by the Federal Court in *Dato' Mokhtar Hashim*, our courts had generally assumed that the principles as laid down in *Muthusamy* require that a ruling as to whether or not the credit of the witness is successfully impeached must be made immediately after the witness has given his explanation (of course, after hearing submissions of counsel of both sides on the explanation and ruling on the explanation). And if the court were to make a decision rejecting the explanation and ruling adversely on the witness' credit, the testimony of the witness ends there and then, and his entire evidence given so far will be discounted.

[39] However, in *Dato' Mokhtar Hashim* such an understanding of the principle was ruled by the Federal Court to be erroneous. Abdoolcader FCJ held:

When a witness's credit is sought to be impugned under the provisions of ss 145 and 155(c) ... his credit stands to be assessed as a whole with the rest of the evidence at the appropriate stage, that is to say, at the close of the case for the prosecution or for the defence, as the case may be. No immediate order of a summary nature can or should be made as was done in this case and the right of cross-examination or re-examination according to the circumstances should not be denied as it may well be that on the exercise of such right his credit might be repaired, restored or reestablished (*Paramasiyam v PP* [1970] 2 MLJ 106 and *Sat Paul v Delhi Administration* AIR 1976 SC 294)... Abdoolcader J took the correct approach in *Public Prosecutor v Datuk Haji Harun bin Haji Jdris & Ors* [1977] 1 MLJ 180 when he refused an application to make an immediate order impeaching the credit of a witness whose evidence contradicted his statement to the police but went on to consider his evidence as a whole at the close of the case for the prosecution and then discounted it as discredited and wholly disregarded it in the circumstances. The procedure for impeachment should be on the lines set out in *Muthusamy v PP* [1948] MLJ 57 but we must stress that the evidence of such a witness must be considered as a whole with the rest of the evidence at the appropriate stage and that any practice which might have developed, as we are told, in the lower courts of making an immediate order of impeachment once a material discrepancy is discovered and no explanation is either offered or accepted, is wholly wrong and should cease immediately. We need only observe in reiterating the absolute fallacy of any such wholly unwarranted practice that a testifying witness cannot be dealt with and struck out or struck off ex tempore and in mid stream at an intermediate stage of the proceedings as if he were a defective writ or pleading.

[40] In *Ong Joo Chin v R* [1946] MLJ 1 Worley J said (at p 2):

> As a matter of practice it is advisable for the prosecuting officer to mark the passage or passages in the statement which he considers inconsistent with the evidence before he hands the statement to the magistrate. This ensures that the attention of the court is drawn to the relevant passage and only the portion allowed by the magistrate need be put to the witness.

[41] Encik Manjeet Singh, as required by the rules of the impeachment proceeding as laid down by the above cases, as a first step, underlined and showed to the court relevant portions of the notes of evidence of the proceeding before the previous trial judge (Kang Hwee Gee J, and notes marked as exh D13B) and submitted that, comparing this previous evidence with the present evidence of PW3, there were eight sets of material contradictions. The learned counsel explained each of the eight sets of alleged contradictions. As required by the rules of the impeachment proceeding, the court was duty bound to examine the past and present statements shown to it and to make a ruling as to whether or not there was any material contradiction or serious discrepancy. In the present case, having so examined, I was satisfied that, out of the eight sets of contradictions submitted, there were five sets of serious discrepancies or material contradictions, namely, the first, second, third, fourth, and seventh sets of contradictions. Accordingly, as required by the rules of the impeachment proceeding, I asked PW3 as to whether he admitted making the previous statements in his evidence before the previous judge; and the witness admitted making the statements (if PW3 had denied making the previous statements or had alleged that the statements were not voluntarily made it would have been incumbent upon me then as a matter of law to hold a trial-within-trial to determine voluntariness or whether the statements were in fact made by PW3; see *Krishnari*). In accordance with the principles, I then called upon PW3 to explain the material contradictions (or serious discrepancies).

[42] The first set of material contradiction (or serious discrepancy) is this. At the previous trial, PW3 said in evidence, during examination in chief-

> Prakash (YKT4) yang telah memberikan kepada saya beg Aunty dengan menghulurnya pada saya melalul cermin hereto sebelah depan sebelah penumpang.

[43] In the present case this witness now said:

> Then Alagendra got back into the car and gave Aunty's bag to me.

[44] On this first set of material contradiction (or serious discrepancy), after having been explained by the court of the contradiction (or discrepancy), PW3 explained:

> I cannot remember about this part. Maybe Prakash gave auntie's bag to me and then I gave the bag to Alagendra. Maybe Alagendra was the one who gave the bag to me while in the car.

[45] As to the second set of material contradiction (or serious discrepancy), PW3 had said at the previous trial the following:

> Saya telah membawa beg tersebut untuk check kandungan beg semasa kereta berjalan sehingga sampai ke station minyak Mobil. Dalam kereta tersebut ada YKT1 dan YKT3 (Alagendra dan Sidney) dan saya.

[46] But in the present proceeding this witness now said:

> About five minutes later, Alagendra got into Sidney's car. Sidney also got into the car and sat at the back. I asked Alagendra to send me home, but instead he asked me to follow him to buy petrol, because he was the one who drove the car. I asked Alagendra to send me home because I was scared. We went to Mobil petrol station at Ampang. Alagendra asked me to buy petrol because his shirt was stained with blood. Then Sidney gave me an empty mineral water bottle and asked me to buy petrol. I got down from the car and bought the petrol for one ringgit. It was my own money. After that we went to the scene. Scott and Prakash were at the scene. I am not sure what they were doing then. Then Sidney got out of the car with the petrol. Alagendra also got out of the car for a while. I gave the petrol to Sidney in the car. Then Alagendra got back into the car and gave Aunty's bag to me. Then Prakash asked a lighter from Alagendra. After that I and Alagendra left the scene. I know it was Aunty's bag because when I opened the bag, I saw a cash cheque and credit card and cash about RM400 and I had seen Aunty using this bag before.

[47] It is significant to note the difference in the sequence of events. In his evidence before this court, PW3 now said that he was given the deceased's bag only after he, Alagendra and Sidney had returned to the scene of incident for the second time, after returning from the Mobil petrol station; and not on the way to the Mobil petrol station. On this second set of contradiction, after having been explained by the court of the contradiction (or discrepancy), the witness explained:

> I had told the police about the mistake that I had made. I wanted to inform the DPP about my mistake. And the police told me that I could not see the DPP because I am a witness. After I had bought the petrol, I went back to the scene. It was there that the bag was given to me. And I cannot remember whether it was Alagendra or Prakash who gave the bag to me. And after that, I and Alagendra left the scene with the bag.

[48] Regarding the third set of material contradiction (or serious discrepancy), PW3, in his earlier testimony before Kang Hwee Gee J said:

> Dalam beg tersebut ada wang tunai sebanyak RM400 cash cheque dan May bank card. Saya kira ada lebih kurang RM400 cheque saya tidak kira.

[49] In his present testimony this witness said:

> Alagendra asked me to check Aunty's bag to see what was inside the bag. When I checked into the bag what I saw was RM400 cash, and if I am not mistaken a cash cheque of RM1,000, a Maybank card and a few other cards which I cannot remember.

[50] On this third set of contradiction (or discrepancy), after having been explained by the court of the contradiction, Haikal Shah explained:

> Of course I did not count the cheque because it was only one piece of cheque. And that amount stated in the cheque was RM1000.

[51] On the fourth set of material contradiction (or serious discrepancy), at the previous trial PW3 said in evidence:

> Di tempat kejadian selepas Aunty diheret keluar kereta saya nampak Prakash (YKT4) masuk ke dalam kereta start kereta dan telah menggelek Aunty yang telah diletakkan di depan kereta,

[52] In his testimony before this court there is no mention by PW3 of such a brutal act by Prakash despite the fact that he gave quite a detail account of what he saw happened at the scene of the crime. All that PW3 now said, of what Prakash did, is this:

> After that Prakash drove the car to the front of Aunty's car and he came out of the car. After that from what I can remember, Prakash asked me to take two bottles from under my car seat... I gave the two bottles to Prakash.

[53] Indeed, in cross-examination PW3 maintained that the deceased car was never moved by anyone after it had came to a stop. This is what PW3 said in cross-examination:

> Q: Which car stopped first? Aunty's car or your car?
>
> A: Aunty's car stopped first.
>
> …
>
> Q: Now mark where Aunty's car was on P4(1)?
>
> A: (Witness marks 'Y' on P4(1) to show where Aunty's car was.)
>
> …
>
> Q: When you came back after buying petrol, was Aunty's car in the same place?
>
> A: As far as I can remember, Aunty's car was at the same place after I had came back from buying petrol.
>
> …
>
> Q: And when you and Alagendra left, Aunty's car was still in the same place?
>
> A: As far as I can remember, Aunty's car was still at the same place when we left.

[54] On this fourth set of contradiction (or discrepancy), after having been explained by the court of the contradiction, PW3 explained:

> I forgot to tell the court about this incident. I now want to tell the court about it. After Prakash asked for petrol from me what I saw was Prakash got into auntie's car and ran over aunty with his car. And after that I saw Sidney and Scott poured petrol over auntie's body.

[55] As to the seventh set of material contradiction (or serious discrepancy), PW3 in his testimony at the previous trial said:

> Semasa di ruang tetamu mereka berdua berbincang-bincang cara-cara untuk menyamun. Saya cuma duduk bersama mereka, cuma mendengar sahaja, Alagendra kata dia akan menyuruh Scott (yang pada masa itu tidak ada bersama kami) untuk menumbuk kepala auntie dan menempatkan kepalanya ke atas peha Scott. ... Selepas itu Scott datang balik lalu pergi ke belakang rumah saya untuk menghisap ganja. Selepas empat atau lima minit selepas Scott selesai menghisap ganja, dia datang balik rumah saya lalu berada bersama kami di ruang tetamu.

[56] At the trial before this court, PW3 said during cross-examination:

> Q: In the discussion that took place while he (Scott) was away, what were you doing?
>
> A: When they were discussing, I was there at the discussion for a minute or two, and then I went to the kitchen to eat.
>
> …
>
> Q: So you heard very little of the discussion because you were there only for a minute or two?
>
> A: Yes.
>
> …
>
> Q: You are lying on this point?
>
> A: I just remember that I went to the kitchen when they were discussing.
>
> …
>
> Q: 'Just remember' means you just remember now or two minutes ago?
>
> A: I remember that I went to the kitchen to eat one or two days ago.
>
> …
>
> Q: You mean yesterday (Monday) or Sunday?
>
> A: Yes

[57] On this seventh set of contradiction (or discrepancy), the witness, having been explained by the court of the contradiction, initially explained as follows:

> There are things which I forgot to tell about this part. In the lounge when Alagendra was discussing, I went to the kitchen for a while and after that I went back into the lounge and sat in the lounge while they were still discussing, and I just listened.

[58] Then the witness asked the court to explain the contradiction again, which the court did. Thereafter, Haikal further explained:

> I was with them in the lounge for a minute or two. Then I went to the kitchen. After that I went back into the lounge, and that was the time when Scott came back.

LEGAL ARGUMENTS ON IMPEACHMENT PROCEDURE

[59] After PW3 had given his explanations to the court on the first, second, third, fourth and seventh sets of contradictions, En Manjeet Singh informed the court that he wished to submit on the issue as to whether or not the witness had furnished the court with satisfactory explanations as to all five set of contradictions; and should the court rule that the witness had failed to provide the court with a satisfactory explanation on any one (or more) of the contradictions, he would submit further that the court ought to rule adversely on the credit of witness.

[60] Encik Hanafiah Zakaria, the learned Deputy Public Prosecutor, objected to the procedure as proposed by En Manjeet. The learned DPP submitted that the court's ruling on the plausibility of PW3's explanations should only be made at the end of the prosecution's case; and, as such, submissions on the explanations should only be made by parties at the end of the case for the prosecution, when parties would in any event be submitting on the issue as to whether or not the prosecution had made out a *prima facie* case. The learned DPP argued that the correct procedure was that, after PW3 had given his explanations, the defence should complete the cross-examination of PW3 and thereafter the prosecution be given the opportunity to re-examine PW3, and that the credit of the witness must be assessed not at this stage but at a later stage, that is to say, in the light of the whole prosecution evidence at the end of the case for the prosecution. For his proposition, the learned DPP relied on *Dato' Mokhtar Hashim*, particularly, the passage in the judgment of Abdoolcader FCJ that I had referred to earlier, and also the case of *Paramasivam v Public Prosecutor* [1970] 2 MLJ 107.

[61] Encik Manjeet Singh, in reply, submitted that *Muthusamy* had ruled that the decision as to whether a witness' explanation is acceptable or not, and whether or not his credit has been successfully impeached, is to be made immediately after the giving of the explanation by the witness concerned. Encik Manjeet further submitted that this procedure as laid down in *Muthusamy* had been confirmed by the Federal Court in *Krishnan* where Salleh Abas FCJ, after having referred to the procedure as laid down by Taylor J in *Muthusamy*, ruled (to repeat):

> This procedure has been accepted and consistently followed by courts in this country and we see no reason to depart from it.

[62] In my view, Taylor J in his judgment in *Muthusamy* was not explicit on the point, and it may well be that that part of the learned judge's judgment that reads:

> If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the court, and he must have a fair and full opportunity to explain the difference. If he can, then his credit is saved, though there may still be doubts as to the accuracy of his memory.

can give the impression that the ruling on the impeachment application (whichever way the ruling goes) ought to be made immediately after the witness sought to be impeached has given his explanation. Indeed, as stated earlier, magistrates, judges and legal practitioners, prior to the *Dato' Mokhtar Hashim* decision, generally (*Paramasivam* is an exception) assumed that *Muthusamy* requires the decision on the impeachment proceeding to be given immediately after the witness had given his explanation. However, be that as it may, in light of the vagueness of the passage (just cited) in the *Muthusamy* judgment, I am not prepared to hold that *Muthusamy* or *Krishnan* is an authority for the proposition suggested by En Manjeet.

[63] Indeed, it ought to be mentioned here that the Singapore Court of Criminal Appeal in *Syed Abdul Aziz v PP* [1993] 3 SLR 538 does not share the view that *Muthusamy* is an authority for the proposition that the court carrying out the impeachment proceeding should make a ruling immediately at the conclusion of the impeachment proceeding. In this case cited, Rajendran J said (at pp 538–539):

> In our view, *Muthusamy v Public Prosecutor* [1948] MLJ 57 does not support the proposition advanced by counsel that the learned trial judges should have made an immediate ruling on the credibility of Jumaat. Although Taylor J in *Muthusamy v Public Prosecutor* took great pains to set out the procedure for impeaching credit, he did not say that the court was obliged at the completion of the exercise to make a ruling whether the credit was impeached or not. There can of course be cases where a court confronted with a materially inconsistent previous statement made by witness is prepared at that stage to indicate that the witness is not worthy of credit and that the evidence of that witness be disregarded but that does not mean that the court is obliged in every case to make such an immediate ruling.

[64] It is to be noted that although the above Singapore decision of *Syed Abdul Aziz* does not subscribe to the view that the decision should be made immediately after the conclusion of the impeachment proceeding, at the same time it also does not subscribe to the position taken by the Federal Court in *Dato' Mokhtar Hashim*. The ruling of the Singapore Court of Criminal Appeal appears to be that the court (carrying out the impeachment proceeding) has a discretion as to whether to make an immediate ruling or to defer the ruling till the end of the prosecution case (or till the end of the defence case, as the case may be), depending on the circumstances of the case. Needless to say, *Syed Abdul Aziz* is merely of persuasive authority.

[65] Now, both *Dato' Mokhtar Hashim* and *Krishnan* are decisions of the Federal Court, the highest court in the land; and needless to say, this court being a High Court is bound by decisions of the Federal Court (see *Dalip Baghwan Singh v Public Prosecutor* [1996] 1 MLJ 1; and *The Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1997] 2 MLJ 829). The Federal Court's judgment in *Dato' Mokhtar Hashim* did not refer to the Federal Court's judgment in *Krishnan*. The learned DPP argued that I am bound by

the decision of the Federal Court in *Dato' Mokhtar Hashim* as it was a later decision, citing another Federal Court's decision, *Dalip Baghwan Singh v Public Prosecutor* [1996] 1 MLJ 1 where Pen Swee Chin FCJ, said (at p 14):

> When two decisions of the Federal Court conflict on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision.

[66] On this point, En Manjeet disagreed with the learned DPP's interpretation of the above dicta of Peh Swee Chin FCJ, and strenuously argued that where two decisions of the Federal Court merely conflict, as opposed to a deliberate departure, any court below (such as this High Court) has the liberty to choose which decision in its view is more commendable to follow; and that this court would only be bound by a later decision of the Federal Court in the situation where the Federal Court in the later decision makes it clear that it is aware of its earlier decision but (for the reasons given) deliberately propose to depart from it. Encik Manjeet pointed out that in *Dato' Mokhtar Hashim* the Federal Court did not mention anything about its earlier decision in *Krishnan*. In other words in *Dato' Mokhtar Hashim* there was no departure from an earlier decision.

[67] With respect, in the present case, the question as to whether or not I have a choice either to follow the decision in *Dato' Mokhtar Hashim* or to follow the decision in *Krishnan* does not arise at all. I am of the view that I am bound by *Dato' Mokhtar Hashim*, but not because it is a later decision in relation to *Krishnan*, but because *Dato' Mokhtar Hashim* is directly on point, whereas *Krishnan* was silent on the issue. As I see it, there is in reality no conflict at all between the judgment of the Federal Court in *Krishnan* and the Federal Court judgment in *Dato' Mokhtar Hashim*.

[68] Abiding by the ruling in *Dato' Mokhtar Hashim*, I had ruled that I would make my ruling on the impeachment application only at the close of the prosecution case and that submissions on the plausibility (or otherwise) of PW3's explanations should also be made at that stage when submissions of no case to answer are made by both sides. Accordingly I directed En Manjeet Singh to continue with his cross-examination of PW3, if he was yet to complete his cross-examination.

[69] Now, at the conclusion of the prosecution case, having considered Haikal Shah's (PW3's) explanations in the context of the totality of the prosecution evidence, I was of the view that his explanations to the five sets of material contradictions (or serious discrepancies) were obviously unsatisfactory (and I do not think I need to elaborate on them) and that there was nothing in the whole of the prosecution evidence that could have salvaged his credit. Accordingly, I ruled that the defence had succeeded in impeaching the credit of this witness. Once the credit of PW3 was successfully impeached, his entire evidence must be discarded; and I so ruled. In my judgment, considering the prosecution case as a whole, once the entire evidence of PW3 is discarded, the prosecution case falls apart.

THE FIRST TRIAL WITHIN TRIAL

[70] Apart from the above ruling, I think, in this judgment, I should also highlight and discuss several other evidence relied upon by the prosecution. One of them is an oral cautioned statement by second accused, Sidney. The prosecution sought to adduce the said oral cautioned statement through a woman police officer, one ASP Naemah (PW14), an investigating officer (sexual offences) of the IPD Gombak. According to PW14, she, on 15 January 1999, was directed by the head of the Criminal Investigation Division, ASP Ishak bin Hussin of IPD Gombak, to interrogate Sidney. Upon receiving the direction she directed one Cpl Johari to have the second accused brought before her from the lock-up of the Rawang police station. It was the evidence of PW14 that in the course of the interrogation certain information was told to her by the second accused. PW14 wanted to inform the court what that information was, but this was objected to by the defence; and on the application of the DPP, a trial-within-trial was held. PW14 (TWT1 in this first trial-within-trial) was the only witness for the prosecution in the trial-within-trial. PW14 said that she directed the handcuffs removed. Then she asked the second accused to remove his shirt, and she examined his body to ascertain if there were injuries; and she found none. PW14 testified that she read out the statutory caution pursuant to s 113 of the Criminal Procedure Code to the second accused who understood it. She said that she made no threat, promise or inducement to Sidney. The defence did not offer any evidence but elected to make a submission of no case to answer at the end of the prosecution case in the trial-within-trial.

[71] After hearing submissions I held that I was not satisfied that the prosecution had succeeded in establishing that prima facie the oral statement was voluntary. First, in the present case, once it appeared to PW14 in the course of the interrogation that the second accused had imparted or about to impart information crucial for the purpose of prosecution or further investigation, she should have made arrangements for the accused to be brought before another police officer, competent to record a cautioned statement, who was uninvolved in the investigation of the case. In the present case, this was not done although PW14 had ample opportunity to do so. Second, there was ample time to take down a written cautioned statement, yet no reason given as to why the oral cautioned statement was not reduced into writing. Third, for the purpose of body examination to ensure that the second accused had not been physically abused, PW14 being a female officer should not have asked the second accused to remove his shirt, and should not have personally carried out the body examination. Such an examination was inappropriate and oppressive. It was high handed and amounted to disrespecting a person's modesty. The second accused being a male, such body examination should have been carried out by a male police officer. Finally the credibility of PW14 was suspect. She was not forthright in her

testimony. In examination in chief during the trial-within-trial PW14 said she examined the body of the second accused to ascertain whether or not there were injuries. But when she was cross-examined by En Saravanan, the learned counsel for Sidney, she denied examining the body of the second accused, despite being questioned on the subject twice. Yet when she was later cross-examined by En Manjeet Singh (counsel for Scott) she changed her evidence and now said that she did examine Sidney's body; and only then did she say that she asked Sidney to remove his shirt.

THE SECOND TRIAL WITHIN TRIAL

[72] In the present case, in the course of the trial, there was a second trial within trial conducted because the prosecution also attempted to tender the cautioned statement (ID30) of the first accused, Scott Allen Hazlett. This cautioned statement was in writing and was recorded by one Chief Insp Prabakharan (PW17) of the Selangor Police Contingent Headquarters at Shah Alam. He recorded the cautioned statement at about 3.20pm on 12 January 1999. It was recorded at the Selayang police station. It was recorded pursuant to s 113 of the CPC. According to PW17 (TWT1 in this second trial-within-trial), he got the instruction from ASP Ishak Hussin (TWT4) to go to the Selayang police station to record the first accused's cautioned statement at about 2pm on 12 January 1999.

[73] The purpose of the trial-within-trial was to determine whether the alleged cautioned statement was made voluntarily. I had ruled that this cautioned statement was inadmissible. From the evidence of the witnesses for the prosecution in the trial-within-trial it was clear that the first accused was not in a proper state of mind to make a voluntary statement. The following facts will show why this was so. The accused was an 18 year old schoolboy. He was arrested at his house around 2.45am on 12 January 1999 by one Insp Azizi (not called as a witness in this trial-within-trial but was 'offered' to the defence at the close of the prosecution case in this trial-within-trial). From his house, he was taken to Taman Melawati police station by one Cpl Dorairaju (TWT3). On arrival at the police station, he was not allowed to sleep. Instead he was interrogated by Cpl Dorairaju (TWT3) for about 45 minutes. Then, at about 4am, he was taken from the Taman Melawati police station by Cpl Dorairaju (TWT3) to the Gombak police station, and there he was placed in a lock-up at about 5.35am. At about 9am Scott was taken out of the Gombak police station lock-up and was taken by Insp Hanifah (PW19/TWT5) to the magistrate's court at Rawang for the purpose of obtaining a s 117 CPC remand order. Inspector Hanifah (TWT5) and Scott arrived at the magistrate's court at about 10.30am and the remand order was obtained around 1pm. While at the magistrate's court, Inspector Hanifah (TWT5) received a phone call from his superior officer, ASP Ishak Hussin (TWT4) of IPD Gombak, directing him (TWT5) to bring Scott before Chief Insp

Prabakharan (PW17/TWT1) at the Selayang police station for the purpose of the recording of a cautioned statement to be made by Scott. So Insp Hanifah took Scott to the Selayang police station. They arrived at the Selayang police station around 2pm and, there, Scott was put in the lock-up. At about 3pm he was taken out of the lock-up by one D/Cpl Hamizol bin Abas (TWT2) to be brought before Chief Insp Prabakharan (TWT1). At about 3.20pm his cautioned statement was recorded.

[74] The above evidence regarding Scott's movements from the time of his arrest until the recording of his cautioned statement shows that Scott was interrogated, moved from one police station to another, and had to spend a few hours at a magistrate's court. In the process, he was deprived of proper sleep and rest before the recording of the cautioned statement. In my judgment, taking into account that he was only an 18-year old schoolboy then, the treatment accorded to him was rather oppressive. Indeed Chief Insp Prabakharan (TWT1) when cross-examined by En Manjeet conceded that Scott was not ready to give a cautioned statement. He said:

> Q: At 2.35am, 12 January 1999 he was arrested. He was not allowed to sleep by the police. At 5.35a.m they put him in a cell at Gombak police station. At 9.15am they took him out and never allowed to rest after that. He was moved around all the time by the police. On those facts, do you think he was ready to give a statement taken at 3.25pm same day (12 January 1999)?
>
> A: No.

[75] Secondly, the nine-page cautioned statement (ID30) contained at least 20 corrections, yet the corrections were only initialed by TWT1/PW17. None were initialed by the first accused. TWT1 said that he overlooked in not asking the first accused to counter-initial the corrections. TWT1 did not explain why there were as many as 20 corrections when the statement is only nine pages long. I have serious doubt if it safe to admit a cautioned statement which contained so many uninitialled and unexplained corrections.

THE REMAINING EVIDENCE

[76] Finally, I think, I should also comment on two other pieces of evidence tendered by the prosecution, namely, a cash cheque (P14) and a partially burnt business card (P19A). I feel impelled to touch on these pieces of evidence since the prosecution appears to place heavy reliance on them.

[77] I shall begin first with the evidence pertaining to the cash cheque, P14. It is the prosecution case that this evidence incriminates the second accused, Sidney. The cheque was a HSBC bank cash cheque of RM1,000 dated 24 December 1998. It bears the signature of one Mdm Seow Saw Poh (name of the deceased victim) the holder of the account to which the cheque relates (note that the alleged murder took place on 27 December 1998). As to how

the cheque came into the hands of the police it is not clear. The prosecution endeavoured to show that P14 was seized from the HSBC bank Kuala Lumpur by the second investigating officer of the case, one Chief Insp Razali (PW21) of IPD Gombak. But PW21's recollection of the cheque was rather hazy. According to PW21, he seized a cheque from the HSBC bank Kuala Lumpur. He said he obtained it either in May or June 2000. He could not remember the precise date. He could not remember the bank officer from whom he obtained the cheque. He was not sure whether he could identify the cheque if the cheque were to be shown to him. There was no evidence that he kept a record of his investigation regarding this cheque. When P14 was shown to him, he merely said:

> Mungkin inilah cheque yang saya ambil itu.

[78] There is no evidence to link P14 with the cheque which PW3 (allegedly) found in the deceased's bag on the day of the alleged murder. This cheque was not shown to PW3 when he gave evidence. Cik Chandra Wati, PW6, the bank's counter clerk who testified for the prosecution said that a male person came to cash the cheque on 28 December; and that this particular customer wrote down on the reverse side of the cheque his signature and his particulars, stating his name as 'Sidney A Micheal' and giving his identity card number as A3271955. She further said that before making payment she carried out the normal banking procedure of asking for the customer's identification card to ensure the correctness of the particulars written by the customers on the reverse side of the cheque as well as to examine the photograph on the identity card presented so as to verify the identity of the holder of the card.

[79] There is also the evidence of the officer from the National Registration Department, En Zaman bin Hamzah (PW18) to the effect that the identity card bearing the number A3271955 was issued to one 'Sidney Alloysious Michael'.

[80] However, be that as it may, PW6, when asked whether she could identify the customer who cashed the cheque on that particular day, was not able to say whether the person who cashed the cheque was one of the three accused. By reason of the inability of the witness to identify the person cashing the cheque, I am hesitant to make a *prima facie* finding of fact that the person who cashed the cheque was the second accused, Sidney Alloysious Michael. I must add that the prosecution did not adduce evidence to show that the signature at the back of the cheque P14 is that of the second accused.

[81] However, even assuming I were to make a *prima facie* finding of fact that the person cashing the cheque before PW6 was, indeed, the second accused, Sidney Alloysious Michael, still, there is no strong evidence to link the second accused with the murder of the deceased. First, there is no evidence explaining as to how the cheque came to be in Sidney's possession.

Second, P14 was never shown to PW3, when he was giving evidence, to be identified by him as being the cheque that he found in the deceased's bag. Third, the second investigating officer, PW21 could not positively say that the cheque that he claimed he seized from the HSBC bank was P14. Indeed, he had a poor recollection of the cheque that he claimed he seized. Thus the origins of P14 become doubtful. Fourth, the credit of PW3 had been impeached. At best, the evidence pertaining to the cheque P14 only casts a suspicion on the second accused. But it is elementary principle of criminal law that mere suspicion alone does not justify the court to rule that a *prima facie* case has been established against the second accused.

[82] Now, I come to the evidence of the remnant of a burnt business card, P19A, found at the scene of the crime by the first investigating officer, Insp Mohd Hanifah (PW19). He found it near the head of the deceased. It is the contention of the prosecution that this card implicates the third accused, Prakash. With respect, I cannot accept this contention. To begin with, there is no name of the employee printed on the card. The card only has the name of the business enterprise printed on it. Encik Siaw Yong Tak (PW13), the owner of a motor workshop known as Raj in Motors identified the burnt card (P19A) as being one of those business cards issued by his workshop. He said the third accused, Prakash, was employed at his workshop as a tow truck operator on a part-time basis from 1996 until one week before he (Prakash) was arrested. However, he said his workshop printed about 5000 of such cards every three months, and they were issued to all his workers, without their names printed on them. He himself did not personally issued out the cards. They were issued by his clerk (who was not called as a witness). Each part-time worker was given about 100 cards and the workers were supposed to distribute the cards to the public. He further said that from 1996 until 1999 he employed many part-time workers but he was unable to say how many.

[83] There can be no doubt that, based on the above evidence alone, the evidence presented is slender, and the court is in no position to make a *prima facie* finding of fact that P19A belonged to the third accused.

[84] Accordingly, all the accused were acquitted and discharged.

Accused acquitted and discharged.

Reported by Peter Ling